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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THOMAS G. FRAME,

Petitioner

v.

GREGORY PLESS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where a prisoner brutally attacks a prison guard and attempts to break into the prison control room, does the prison officials' decision to place that inmate in a segregation cell that lacks anything that can be used for destructive purposes for four and one-half days pending a disciplinary hearing violate due process of law under the standards announced in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Hewitt v. Helms*, 103 S. Ct. 864 (1983)?

2. Where a prisoner freely admits at the federal court trial of his civil rights claim that he attacked a prison guard, where his federal court pleading expressly asserts that he pleaded guilty to assaulting an officer at the prison disciplinary hearing and where he was convicted of aggravated assault and battery in state court criminal proceedings arising from the same incident, can he recover damages for alleged violations of his rights under due process of the Fourteenth Amendment on the theory that he cannot be punished by being placed in a segregation cell before he is given a hearing before the prison disciplinary board?

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OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania which was entered on March 30, 1983 is not reported. The Opinion of the United States Court of Appeals for the Third Circuit was likewise not reported. Both Opinions are included herein as Appendices "A" and "B", respectively.[1] *See* App. at A-1 & A-10.

1. All of the parties to the case are listed in the caption to the Court of Appeals' Opinion, which is attached as Appendix "B". App. at A-10. This satisfies the requirement of Supreme Court Rule 21.1(b).

STATEMENT OF JURISDICTION

On January 27, 1984, the Court of Appeals for the Third Circuit filed an Opinion affirming the judgment of the District Court. On February 28, 1984, the Court of Appeals entered an Order, a copy of which is attached as Appendix "C", App. at A-14, denying Warden Thomas G. Frame's Petition for Rehearing. This Court has jurisdiction to review this Petition for Writ of Certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

This Petition for Writ of Certiorari requests this Court to consider Section One of the Fourteenth Amendment to the United States Constitution which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Petition also involves 42 U.S.C. §1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress."

STATEMENT OF THE CASE

This is a *pro se* prisoner civil rights case[2] that arises from prison officials' decision to immediately confine an inmate to a segregation cell following his unprovoked, bloody and vicious attack — with fists, with feet and with a wooden bench — on a prison guard. The prisoner also attempted to break into the Control Room of the prison. The inmate readily admitted the assault at the trial of this action, and paragraph 7 of his *pro se* complaint (Appendix "E") asserted that he had admitted his guilt at the prison disciplinary board hearing. In addition, he was convicted of the resulting state court criminal charge of aggravated assault and battery for which he received a one to three year prison sentence. The District Court characterized the inmate's conduct as "outrageous assaultive behavior", App. at A-4, and it found that his confinement in the spartan living conditions of a segregation cell did *not* violate the prisoner's constitutional rights to the extent that he was confined there *after* the formal prison disciplinary hearing. However, it held that he had been denied due process of law under the Fourteenth Amendment to the Constitution in connection with the four and one-half days that he spent in the same cell and under the same conditions *before* the hearing and awarded him damages against Warden Thomas G. Frame, the petitioner.

A. *The Evidence At Trial*

Respondent, Gregory Pless was a pretrial detainee at Chester County Prison in Lenape, Pa., awaiting trial in a neighboring county arising from a crime spree for which he was ultimately convicted and sentenced to a term of forty-five to ninety years. (N.T. 16). On the evening of July 30, 1981, two correctional officers were performing a routine cell-to-cell search in the maximum se-

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2. The claim was asserted under 42 U.S.C. §1983, and federal jurisdiction lies under 28 U.S.C. §1343(4).

curity block of the prison. In accordance with standard prison practice, inmate Pless was permitted to observe the search. He inexplicably began cursing the guards, and, as one of them pulled out a drawer in his cell, he knocked it from the officer's hands. (N.T. 25). The guards reported the incident to their superior who instructed them to prepare a citation and a report on the incident, charging Pless with cursing an officer. One of them, Officer Donald Hunt, prepared the citation and when he attempted to hand the citation to Pless the prisoner attacked him. Another guard came to Hunt's aid, pulled Pless away and ran to the Control Room, a secure area accessible to guards only, to call for assistance. Pless attempted without success to force his way into the Control Room; he then returned to the injured Officer Hunt and proceeded to hit and kick the guard in his face and his stomach. When reinforcements arrived, they observed Pless hitting Hunt in the head with a wooden bench. (N.T. 59-60).

Pless was immediately removed and placed in Cell C-22 in the prison's segregation area. The incident citation, stained with Officer Hunt's blood, was admitted at trial (N.T. 28) (Appendix "D"), where Pless freely admitted the assault and the fact that Hunt was hospitalized as a result of his attack. In response to the District Judge's invitation to tell him what happened, Pless began by explaining that: "It was an incident on the G block where I assaulted a correctional officer." (N.T. 3). When the Judge characterized the incident as a "scuffle",[3] Pless corrected him:

> "No, it wasn't a scuffle. This one particular guard I assaulted. So they moved me to [a segregation cell]." (N.T. 4).[4]

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3. At another point, the District Judge described the attack on Officer Hunt as a "tangle". (N.T. 10).

4. Pless later repeated his concession that he assaulted Officer Hunt, stating "I am not denying that." (N.T. 56).

In addition, as noted above, the Commonwealth of Pennsylvania filed criminal charges arising from the incident. Pless was convicted of aggravated assault and battery and received a sentence of one to three years in prison. (N.T. 4).

Pless was confined on a twenty-four hour lockup basis to Cell C-22 until August 13, 1981, a total of two weeks. (N.T. 35). On August 5, four and one-half days after the attack on Hunt, Pless was given a prison disciplinary hearing on charges stemming from both the assault and the cursing incident. In paragraph 7 of his Complaint (Appendix "E", App. at A-17) the prisoner described the hearing in these words:

> "On 8/4/81, Pless was given a disciplinary hearing by Capt. Rilatt, Sgt. Gray, and C.O. 1 Poles. Pless was charged with 'assaulting an officer', C.O. 1 Hunt. Plaintiff Pless, plead [sic] guilty, and was sentenced to 120 days in Cell 'C-22'."

The evidence showed that Cell C-22, one of four adjacent segregation cells, is clean but austere. It is designed to hold prisoners who are extremely violent or who are mental patients. (N.T. 33-34, 7). It has no furnishings, and it lacks a conventional toilet. Instead it is equipped with a tamper-proof waste facility that is level with the ground and which can be flushed from inside the cell. (N.T. 33). Inmates in Cell C-22 are given regular meals (N.T. 35) and drinking water on request. (N.T. 36, 19, 12). In addition, personal hygiene privileges are restricted. Because he was on twenty-four hour lockup status, Pless was not permitted to shower except for court appearances (N.T. 36) and such items as toothbrushes, washcloths and soap were sparingly provided. (N.T. 57). Another feature of the twenty-four hour lockup is the elimination of out-of-cell exercise opportunities. (N.T. 34-35). Finally, because Cell C-22 is an isolation area for problem inmates, guards check on the activity and well-being of inmates at least once an

hour and keep a log of their observations. District Court Memorandum and Order, App. at A-3, N.T. at 32.

Inmates are assigned to Cell C-22 as a last resort in those unusual instances in which, in the judgment of prison officials, a particular inmate's conduct is so irrational and so disruptive of the prison security and order that segregated confinement in a cell that lacks anything that is capable of being used for destructive purposes or which can itself be destroyed is necessary for the protection of guards, other inmates, prison property and the violent inmate himself.

B. *The District Court Opinion*

The District Court summarized the attack on Hunt as follows:

> "Officer Hunt attempted to serve upon plaintiff a citation charging him with [a] major misconduct. . . . After an exchange of words, plaintiff struck Mr. Hunt in the face with his fist. Another officer separated the combatants, and ran to the control room to call for assistance. Plaintiff attempted to enter the control room, but was prevented from doing so, whereupon he returned to Mr. Hunt and continued to beat and kick him, eventually throwing a bench upon him as he lay on the floor. Mr. Hunt required hospitalization.
>
> Plaintiff was immediately placed in segregated confinement in Cell C-22, a 'medical isolation' cell for unusually disruptive prisoners."[5] District Court Memorandum and Order, App. at A-1.

The District Court concluded with little difficulty that the inmate's *post*-hearing confinement in Cell C-22 did not offend the due process clause:

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5. There was no evidence at trial that Cell C-22 was a "medical isolation" cell. In any event, it was a cell for "unusually disruptive prisoners", as the trial court correctly noted.

> "With respect to the due process claims, it should be noted that plaintiff was afforded a hearing on August 4, 1981. He was informed of the charges, and had an opportunity to refute them. Thus, his post-August 4 solitary confinement cannot be regarded as a deprivation of liberty with due process of law. . . . In my view, the prison authorities cannot be faulted for imposing solitary confinement during that period. *Plaintiff's outrageous assaultive behavior on July 30 posed a serious threat to prison security, and it was obviously not unreasonable to segregate plaintiff immediately, pending the hearing.*" District Court Memorandum and Order, App. at A-4 (emphasis added).

In short, the trial court construed the due process clause of the Fourteenth Amendment as *not* prohibiting prison officials from confining an inmate to the spartan environment of Cell C-22 *after* the prison disciplinary hearing at which his guilt in attacking Officer Hunt was formally decided.

Confinement to the same segregation cell and the same conditions for the four and one-half days *before* the hearing was an entirely different matter in the District Court's view. The fact that Pless had engaged in "outrageous assaultive behavior [that] posed a serious threat to prison security" was not sufficient to justify placing plaintiff in Cell C-22 before the hearing. According to the District Court, placing an inmate in Cell C-22 for any amount of time before the formal hearing constituted impermissible punishment:

> "This does not mean, however, that it was permissible to punish plaintiff without a hearing, or to impose restrictions unrelated to the legitimate objective of preserving prison security and restoring order and it is impossible, on this record, to avoid the conclusion that the treatment accorded plaintiff during that four day period represented a punish-

> ment, as opposed to security precautions." District Court Memorandum and Order, App. at A-4.

The District Court then quoted extensively from administrative regulations that prescribed, *as a matter of state law*,[6] minimum requirements for prison living conditions. 37 Pa. Code §§95.229, 95.231, 95.233, 95.240. The Court concluded that "to the extent that the plaintiff was deprived of decent bedding materials, access to showers and minimal sanitary facilities, and kept deprived of a reasonable opportunity for exercise" for the period *before* the hearing, he suffered punishment without due process of law. District Court Memorandum and Order, App. at A-4.

Even though it was satisfied that the inmate's Fourteenth Amendment rights had not been violated *after* the hearing, the trial court went on to consider whether during his post-hearing confinement to Cell C-22 plaintiff had been subjected to cruel and unusual punishment in violation of the Eighth Amendment. Describing the question as "close", the Court concluded that the prisoner's Eighth Amendment rights had not been violated, evaluating the evidence as follows:

> "He was required to sleep on the floor, without adequate bedding and without normal clothing; but it was summertime, and plaintiff apparently did obtain adequate rest. He was deprived of two hours of exercise outside his cell, but he was able to obtain exercise within the cell. The defendants have not established any justification for disregarding plain-

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6. Although state prison regulations are relevant to a determination of whether an inmate has a liberty interest that is protected under the Fourteenth Amendment, *see Hewitt v. Helms*, 103 S.Ct. 864 (1983), a violation of state law does not in and of itself constitute a violation of federal constitutional rights. In fact, the Eleventh Amendment prohibits the federal courts from requiring state officials to comply with their own state law. *Pennhurst School & Hospital v. Halderman*, 104 S.Ct. 900 (1984).

tiff's special dietary needs, but plaintiff apparently obtained at least minimally adequate nourishment during the entire period." District Court Memorandum and Order. App. at A-8.[7]

Notably absent from the District Court Opinion is any citation to the authority that guided its analysis.

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7. Both the District Court and the Court of Appeals decided the Eighth Amendment question in favor of Warden Frame and, accordingly, this Petition does not present an Eighth Amendment question. However, the District Court's ruling under the rubric of Eighth Amendment that the inmate's post-hearing conditions were minimally adequate is irreconcilable with its finding that the pre-hearing confinement in identical conditions did not satisfy the substantive notions of fairness embodied in the due process clause of the Fourteenth Amendment. In any event, the Eighth Amendment issue, far from being "close", is devoid of merit. First, only convicted prisoners — and not pretrial detainees — may be punished in the Eighth Amendment sense of punishment following conviction of a crime. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Thus, challenges to conditions in which detainees are confined cannot be tested under the Eighth Amendment. Second, the Eighth Amendment does not license the judiciary to exercise a veto power over conditions that seem marginally unpleasant or even severe. Rather, the Eighth Amendment prohibits only "the wanton and unnecessary infliction of pain". *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). *Cf. Hutto v. Finney*, 437 U.S. 678, 681 (1978) (involving state prisons that the District Court described as "a dark and evil world completely alien to the free world"). In *Hutto*, some of the conditions that prompted the District Court to find Eighth Amendment violations were the assignment of an average of four and sometimes many more prisoners to each windowless eight foot by ten foot cell containing no furniture and a toilet that could not be flushed from inside the cell; meals that consisted primarily of "grue", a pasty concoction of meat, potatoes, oleo, syrup, vegetables and eggs; punishments that included whipping with a leather strap; sixty hour work weeks in the fields; rampant inmate assaults and rapes; electrical shock punishment; and a bizarre inmate hierarchy of "trusties". It would trivialize the Eighth Amendment to compare Pless' four and one-half days of pre-hearing segregation in Cell C-22 to the conditions that existed in *Hutto*.

C. *The Court of Appeals Opinion*

The Court of Appeals for the Third Circuit affirmed the judgment of the District Court in a short Memorandum Opinion that was designated "Not for Publication". After summarizing the trial record — and with scanty citation to authority[8] — the Court of Appeals decided, with a minimum of analysis, that the District Court had correctly decided a "close" question.

ARGUMENT

The Supreme Court has long recognized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). In *Hewitt v. Helms*, 103 S. Ct. 864 (1983), this Court re-emphasized that "prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests." 103 S. Ct. at 869. Prison officials' judgments are entitled particular deference in matters touching upon prison security:

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8. The Court of Appeals cited only *Hewitt v. Helms*, 103 S. Ct. 864 (1983), in the body of its opinion. *Hewitt* was cited for the proposition that "in view of the serious threat to prison security posed by appellee's assaultive behavior, authorities acted properly in restricting him, even prior to a hearing, in solitary confinement." App. at A-12. The Third Circuit also cited a 1972 Second Circuit opinion and a 1975 decision by the District Court of Nevada which the Court of Appeals described as holding that "similar conditions constitute cruel and unusual punishment." App. at A-13 n.4. Those cases are inapposite. Both pre-dated applicable decisions of this Court including *Bell v. Wolfish*, 441 U.S. 520 (1979), *Rhodes v. Chapman*, 452 U.S. 337 (1981), and *Hewitt v. Helms*, 103 S. Ct. 864 (1983). Further, neither of those cases involved pretrial detainees.

> "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Pell v. Procunier,* 417 U.S. 817, 823 (1973).

In the case of inmate challenges to prison practices, the general rule is that the practice is valid if it bears a *rational relationship* to any legitimate prison interest. *E.g., Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 129 (1977).

A. Warden Frame Did Not Violate the Prisoner's Right to Due Process of Law During the Four and One-Half Days That He Spent in Segregation Before the Disciplinary Hearing.

1. Under *Bell v. Wolfish,* Warden Frame Did Not Deprive the Prisoner of Due Process of Law Because the Confinement to Cell C-22 Was Rationally Related to the Compelling Prison Interest of Preserving Security and Order.

Neither the District Court nor the Court of Appeals made any reference to *Bell v. Wolfish,* 441 U.S. 520 (1979), which is the leading case on the subject of the constitutional rights of pretrial detainees. In *Bell* a class of pretrial detainees challenged as unconstitutional a myriad of conditions and practices at the Metropolitan Correctional Center in New York City. The District Court entered a broad injunction ordering changes in many prison practices and that injunction was, in large part, affirmed by the Court of Appeals for the Second Circuit. The Court of Appeals held that pretrial detainees could be subjected only to those restrictions that "inhere in their confinement itself or which are justified by compelling necessities of jail administration." 441 U.S. at 523-24.

This Court rejected the "compelling necessity" analysis and reversed. The *Bell* analysis began with a recognition of the principle that detainees may not be punished since they have not been found guilty of the crimes with which they are charged. 441 U.S. at 535. The only purpose for imprisoning a detainee is to insure his presence at trial. Thus, although it may be necessary to confine a detainee, the confinement is not punishment, as such. Confinement in a prison necessarily entails substantial restraints on a detainee's liberty:

> "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of the detention into 'punishment'." 441 U.S. at 537.

Thus, the applicable question in any case involving a detainee's challenge to the conditions of his confinement is whether the challenged restraint is punishment, on the one hand, or incidental to the legitimate governmental purpose of confinement pending trial, on the other hand. The *Bell* Court prescribed a test that focuses on whether there is any *reasonable relationship* between the prison officials' action and the prison's interests:

> "Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' *Thus, if a particular condition*

> *or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'.* Conversely, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. *Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.*" 441 U.S. at 538-39 (emphases added, citations omitted, footnotes omitted).

In short, unless there is evidence that prison officials intended to punish a detainee, their actions cannot be disturbed so long as there is some reasonable connection between the challenged conduct and a legitimate governmental objective. Moreover, prison officials must be given wide berth in determining what measures are reasonably related to the unenviable task of operating a safe and secure prison.

There are at least two government objectives associated with the confinement of pretrial detainees. First, the restraint on liberty of charged but unconvicted prisoners is justified by the need to insure that person's presence at trial. Second, having committed a detainee to prison pending trial, the government has an important interest in operating the prison facility in a proper, secure and orderly manner. The *Bell* Court recognized that the government's management interest is no small matter:

> "These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the

> detainee shows up at trial. For example, the government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. *Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.*" 441 U.S. at 540 (emphasis added, footnote omitted).

Based on the above analysis, this Court upheld a series of prison policies and practices against constitutional challenge, including the practice of double bunking, a policy that prohibited inmates from receiving literature from sources other than the publisher or book clubs, a prohibition on receiving packages from the outside, the practice of not permitting inmates to observe cell searches and the policy of requiring inmates to submit to body cavity strip searches following contact visits.

Both the District Court and the Court of Appeals failed to recognize the applicability of *Bell v. Wolfish*[9].

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9. Other Courts of Appeal have reached different conclusions under similar conditions. *Jones v. Mabry*, 723 F.2d 590 (8th Cir. 1983), is illustrative. There, plaintiffs were a group of inmates who had participated in an escape attempt and an incident in which a group of inmates had refused to leave the dayroom. Prison officials created a new high-risk inmate classification for these inmates and placed them in segregation. They were required to wear leg irons and shackles when they left their cells; they were strip searched upon entering and leaving the cell; and most other privileges including exercise and showers were sharply curtailed. Applying the test announced in *Bell v. Wolfish*, supra, the Eighth Circuit upheld the prison officials' decisions, observing that:

> "It is for them, not us, to make this sort of decision in the first instance, and the courts should intervene only when complaining inmates have carried the burden of proving a clear excess on the part of the defendant officials. These issues, at bottom, are questions of judgment and degree, and on such questions

On July 30, 1981, inmate Pless went beserk and, in a nearly homicidal rage, he viciously attacked an unarmed prison guard with his fists, feet and a wooden bench, and he also attempted to break into the prison Control Room. In fact, one could hardly imagine a situation involving an unarmed inmate, acting alone, that posed a greater threat to prison security. Faced with this episode of extreme violence, the prison officials decided that it was necessary to immediately place Pless in the single most secure cell in the prison. That cell was a clean, lighted cell in the segregation area that lacked any implements that conceivably could be used for purposes of destruction.

The District Court recognized that plaintiff had engaged in "outrageous assaultive behavior" and that his behavior "posed a serious threat to prison security" that justified his immediate transfer to solitary confinement. However, the District Court apparently considered the conditions that the prisoner was subjected to in Cell C-22 to be unnecessarily harsh and were thus "punish-

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NOTE 9 — *(Continued)*

> we should be slow to substitute our judgment for that of the officials who must deal with the situation first-hand." 723 F.2d at 595.

Notably, the *Jones* Court was somewhat troubled by the use of leg irons and shackles, especially after the security risk posed by the inmates seemed to the Court to have subsided. Consistent with its duties under *Bell v. Wolfish*, the Eighth Circuit nevertheless deferred to the prison officials' judgment:

> "It may be, as plaintiffs argue, that they were kept in leg irons longer than necessary, and that the emergency created by the escape attempt had been successfully dealt with. . . . It is easy enough, with hindsight, to criticize the reaction of prison officials. . . . Under all the circumstances, we believe that the action taken was intended to prevent future escapes and to maintain security within the East Building, and that the means employed were not so clearly disproportionate, when measured against these purposes, as to deserve condemnation as 'punitive.' " 723 F.2d at 595.

This is precisely the analysis that both the District Court and the Court of Appeals failed to perform in this case.

ment", as opposed reasonable measures taken to protect the order and security of the prison environment.

The District Court was wrong for two fundamental reasons, both dictated by the *Bell* decision. First, in leaping to the conclusion that pre-hearing detention in Cell C-22 was punitive rather than security related, the Court failed to give prison officials the benefit of the deference that is due them. Chester County officials, who had just witnessed one of their number receive a cruel beating at the hands of a prisoner, made an on-the-spot judgment to place the inmate in the prison's most secure cell. Significantly, they did so without a hint of harassment, much less violence, on their part. That decision, made in the heat of battle, was lightly brushed aside by the District Court, which was guided by the 10,000 watt light of hindsight.

Second, none of the conditions in Cell C-22, either singly or in combination, were so totally unrelated to the prison's interest in separating an uncontrollable inmate from implements of destruction as to offend the notions of fairness that underlie the due process clause of the Fourteenth Amendment:

(1) *Food*

The trial court described plaintiff as a vegetarian who "has particularly strong religious convictions which preclude his eating pork in any form"[10], and it appeared troubled by the fact that his dietary preferences were not catered to. Yet, plaintiff's complaints about the food were minimal. He testified that "[a] lot of food they brought to me had pork in it" and, when he complained, "[s]ometimes it was corrected but a lot of times, you know, the food had pork in it." (N.T. 6). His only other comment about

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10. There is no evidence in the trial record that plaintiff's "vegetarian" preference was based on religious convictions. In addition, the evidence showed that his "vegetarian" life-style did not prevent him from eating chicken and fish. (N.T. 6,35).

the food was a concession that meals were accompanied by juice and coffee. (N.T. 12). In any event, even if the prisoner's dietary preferences occasionally were not heeded, this hardly rises to the level of arbitrary and purposeless "punishment" that would be forbidden. In fact, in the course of discussing the Eighth Amendment issue, the District Court recognized that plaintiff received "at least minimally adequate nourishment during the entire period." District Court Memorandum and Order, App. at A-8.

(2) *Plumbing Fixtures*

The District Court also seemed disturbed by the fact that Cell C-22 was devoid of conventional plumbing fixtures. There was no running water in the cell and, instead of a conventional toilet, the cell was equipped with a tamper-proof waste facility that was level with the ground. The toilet could be flushed from inside the cell, although it was necessary for a guard to turn the water on. Plaintiff complained that, in order to relieve himself, he was required to "squat like an animal." Significantly, there is no suggestion in the record that human waste was permitted to accumulate while Pless was in the cell or that it was otherwise unclean. In fact, the evidence showed that plaintiff was periodically given a mop or broom for the purpose of cleaning his cell. (N.T. 35-36). Although the absence of a conventional toilet might be considered by persons other than outdoorsman and those who have served in the military as unpleasant, it is neither unhealthy, inhumane nor unrelated to prison security. Plumbing is capable of being destroyed and pieces of plumbing fixtures are susceptible of being used as weapons. Given the fact that plaintiff was prone to episodes of extreme violence, it was not irrational to place him in a cell that lacked plumbing fixtures.

(3) *Lack of Exercise*

The District Court also disapproved of the fact that plaintiff was not given an opportunity to have exercise out of his cell. Plaintiff was assigned to Cell C-22 on a twenty-four hour lockup basis. Clearly, there is a direct and reasonable relationship between prison security — plaintiff had committed an act of extreme violence — and his confinement to a cell on a twenty-four hour basis. There was a clear and present danger that he would assault others. That risk necessarily eliminated the opportunity for exercise outside the confines of his cell, but there was nothing to prevent the prisoner from engaging in exercise such as calisthenics inside his cell.

(4) *Mattress*

Cell C-22 is a bare cell; it lacks any furniture including a mattress. Yet mattresses, like other items of property, can be put to dangerous uses. Mattresses have metal coils that could be fashioned into crude weapons and strips of fabric can be used to make mischief as well. As such, it was not irrational to place a violent inmate in a cell that lacked a mattress, at least until his condition was stabilized. Further, the absence of a mattress in a segregation cell for a short period of time is not a condition that rises to the level of a constitutional violation. Thus, the District Court itself found that the eight days of *post*-hearing confinement without a mattress was not cruel and unusual "punishment":

> "He was required to sleep on the floor, without adequate bedding and without normal clothing; but it was summertime, and plaintiff apparently did obtain adequate rest." District Court Memorandum and Order, App. at A-8.

Those same considerations should have prompted the District Court to defer to prison officials' deci-

sion not to allow Pless a mattress during the first four and one-half days of his stay in Cell C-22.

(5) *Showers and Washing*

The trial court also took umbrage at the fact that Pless was denied showers and the opportunity to wash. Yet, the evidence is clear that he was permitted to shower before Court appearances (N.T. 20, 37, 39). Moreover, Pless was on a twenty-four hour lockup status, the purpose of which was to isolate him from all other persons in the prison in light of the attack on Officer Hunt that immediately preceded his confinement. In addition, the absence of showering privileges for the four and one-half days before the hearing is in any event inconsequential.

2. The District Court Disregarded the Letter and Spirit of Hewitt v. Helms

The District Court disregarded and the Court of Appeals paid mere lip service to *Hewitt v. Helms*, 103 S. Ct. 864 (1983), a recent decision of this Court that addresses the question of what procedural protections must be afforded to prisoners under due process clause of the Fourteenth Amendment in connection with transfers from general population to administrative segregation. *Hewitt* arose from strikingly similar facts involving an inmate riot at the Pennsylvania State Prison at Huntingdon. Inmate Helms assaulted a guard and in the aftermath of the assault several groups of inmates attempted to seize the prison control center and other key posts. A number of guards were injured, and the intervention of the state police, local law enforcement authorities and off-duty prison guards was necessary to restore calm.

Following the riot, inmate Helms was questioned about his role in the riot, and he was immediately placed in administrative segregation pending investigation of

his role in the riot. The next day, he was given a misconduct report which accused him of assaulting officers and conspiring to take over the control center. Five days later a hearing was held on the charges and no finding was made. Almost one month after the riot took place, a committee of three prison officials met to review inmate Helms' status in administrative segregation and concluded that he would be a danger to staff and other inmates if he were released into the prison population. Two weeks after that a second misconduct report was issued charging Helms with assaulting yet another officer during the riot. A hearing was held on that charge, and the hearing committee found Helms guilty and ordered him confined to disciplinary segregation for six months.

Against that factual background, the Court of Appeals for the Third Circuit held that Pennsylvania prison regulations gave rise to a protectable liberty interest, and it remanded the case for an evidentiary hearing concerning the nature and adequacy of the first prison disciplinary hearing. This Court agreed that Pennsylvania's detailed regulations concerning segregated confinement created a protectable liberty interest, but it reversed the judgment of the Court of Appeals on the basis that the inmate had received all of the process that was due him under the Fourteenth Amendment.

The *Hewitt* Court was guided in its analysis by two fundamental considerations concerning the constitutional rights of prisoners. First, the Court noted that "we have recognized that broad discretionary authority is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking. . . .' " 103 S. Ct. at 869, quoting *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). Second, it was noted that Supreme Court decisions have "consistently refused to recognize more than the most basic liberty interests in prisoners." 103 S. Ct. at 869.

In the *Hewitt* Court's judgment, the very strong government interest in maintaining prison security and

in segregating the inmate pending the outcome of the investigation greatly outweighed the inmate's slight private interest in remaining in the general prison population. Accordingly, the Court concluded that the due process clause required only that prison officials hold an "informal, nonadversary evidentiary review" of the charges that resulted in the transfer. 103 S. Ct. at 872 & 874. Moreover, there is nothing that would require that the informal review take place before transfer; it need only be done within a reasonable time afterwards:

> "The proceeding must occur *within a reasonable time following an inmate's transfer*, taking into account the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials." 103 S. Ct. at 874 n. 8 (emphasis added).

The Court so held even though the conditions in segregation imposed what it described as "severe hardships". 103 S. Ct. at 869 n.4.

The hearing that the *Hewitt* Court found adequate took place five days after the inmate's transfer to segregation. This case is virtually indistinguishable. Inmate Pless was given his hearing within four and one-half days. Thus, not only were the Chester County officials justified in immediately transferring Pless to segregation, but they also gave him a hearing within a reasonable time. Under the circumstances, it is difficult to fathom the constitutional basis that prompted the District Court to find that the due process clause of the Fourteenth Amendment was violated by subjecting inmate Pless to Cell C-22 for the four and one-half days *before* the hearing. The District Court reached that conclusion despite the fact that:

> (a) it found that it was not improper to subject the prisoner to the same conditions after the hearing;
>
> (b) the prison officials had permissibly transferred him to segregation before the hearing; and

(c) the hearing was held within a reasonable amount of time.

Simply put, the District Court's reasoning was pure sophistry.

B. A Hearing Was Not Necessary Because Pless Has Repeatedly Conceded That He Attacked Officer Hunt.

Inmate Pless has readily acknowledged that he was guilty of attacking a prison guard. He does not and never has contended that a hearing was a prerequisite to confining him to Cell C-22. Instead, his complaint has always been that Chester County prison officials violated his federal constitutional rights by subjecting him — *regardless of his conduct* — to conditions that were lacking in the basic amenities to which he was accustomed. To put it another way, his position was that no inmate may *ever* be placed in Cell C-22 no matter how great a threat he poses to the security of the institution.

In paragraph 7 of his Complaint, Pless explicitly stated that he pleaded guilty at the prison disciplinary hearing to attacking Hunt:

> "On 8/4/81, Pless was given a disciplinary hearing by Capt. Rilatt, Sgt. Gray, and C.O. 1 Poles. Pless was charged with 'assaulting an officer', C.O. 1 Hunt. Plaintiff Pless, plead [sic] guilty, and was sentenced to 120 days in Cell 'C-22'."

The Complaint goes on to describe the litany of indignities that he was allegedly subjected to.[11] In addition, Pless admitted his guilt at trial, repeatedly describing his

---

11. The force of Pless' allegation that he pleaded guilty at the prison hearing is not diminished by the fact that Warden Frame introduced a document that suggested that the inmate had in fact claimed that he had acted in self-defense. (N.T. 54). The point is that plaintiff in this action has claimed from the very outset that he had in fact attacked a prison guard, and the hearing was thus irrelevant because there were no disputed material facts.

conduct as an "assault" on Officer Hunt. In fact, when the trial judge described the attack as a "scuffle", Pless corrected him. Further, Pless was convicted of the state court criminal charge of aggravated assault and battery, and sentenced to additional prison time. There is no suggestion in the record that he contested his guilt on that occasion either. In sum, the prisoner has never disputed that his conduct was, as the District Court found, "outrageous assaultive behavior," and he has never contended that there was any significance to the prison hearing.

The purpose of the due process clause of the Fourteenth Amendment is to afford persons facing a loss of protected liberty interests a forum for deciding disputed questions of fact:

> "[T]he remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.' *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam) (citation omitted).

In *Codd* plaintiff, in a complaint alleging claims under 42 U.S.C. §1983, asserted that a report that appeared in his personnel file to the effect that he had attempted suicide stigmatized him, but he made no allegation that the report was false. Rejecting the argument that he was entitled in any event to a hearing to clear his name, this Court observed that:

> "[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has [plaintiff] affirmatively asserted that the report of the apparent suicide attempt was substantially false." 429 U.S. at 627.

Here, likewise, there was no need for a hearing to refute the charge of assaulting an officer because the charge was not disputed.

The District Court, for reasons that are not readily apparent, considered the date of the hearing as the pivotal moment that transformed an unlawful punitive incarceration into a lawful one. Yet, as pointed out above, the hearing was and should be considered as having no significance. Pless assaulted Officer Hunt, he admitted in his complaint that he pleaded guilty to assaulting officer Hunt at the prison hearing and he admitted at the trial of this action that he assaulted Officer Hunt. The only relevant question should have been whether, in light of Pless' unprovoked and vicious assaults on Officer Hunt, his confinement to Cell C-22 was so unrelated to the prison's security and order as to be arbitrary and purposeless. The answer, of course, is that it was not.

CONCLUSION

The Court should grant the Petition for Certiorari for the following reasons:

(1) The District Court apparently failed to consider — and if it did consider, seriously misconstrued — *Bell v. Wolfish*, 441 U.S. 520 (1979), which is the leading case governing constitutional challenges to treatment of pretrial detainees. Under *Bell*, prison officials may, in the interest of preserving prison security, do anything that is reasonably related to that vital goal. Moreover, officials' judgments about what is necessary to the maintenance of order are entitled to wide latitude. Only if, considering the deference owing to the officials' decisions, the Court finds that the actions were arbitrary or purposeless, is the due process clause of the Fourteenth Amendment violated.

(2) The District Court disregarded *Hewitt v. Helms*, 103 S.Ct. 864 (1983). *Hewitt* reaffirmed that prison officials have broad discretionary authority to transfer inmates from general population to

segregation. *Hewitt* also held that the due process clause is satisfied if a hearing is provided within a reasonable time *after* the transfer to segregation.

(3) The District Court attached pivotal importance to the prison disciplinary hearing; confinement to Cell C-22 *before* the hearing was unconstitutional, and confinement to the same cell *after* the hearing was lawful. The hearing, however, is irrelevant. The prisoner does not and never has contended that the charge of assaulting an officer was false. Under *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam), the Constitution does not require a hearing where there is no material dispute of fact.

To the extent that judges, lawyers and laymen might find the thought of segregated confinement under the spartan conditions that exist in Cell C-22 discomforting in the abstract, the following admonition from *Bell v. Wolfish*, supra, aptly summarizes the limited role of the judiciary in passing upon the constitutionality of the conditions in segregated confinement areas of prisons:

> "[Many courts] have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in which branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be

limited to the issue of whether a particular system violates any prohibition of the Constitution. . . .The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the judicial branch of government." 441 U.S. at 562.

Respectfully submitted,

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APPENDICES

APPENDIX A

A-1

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY PLESS, et al.	:	Civil Action
v.	:	
RONALD J. MARKS, et al.	:	No. 81-4463

MEMORANDUM AND ORDER

FULLAM, *J.* March 30, 1983

During the evening hours of July 30, 1981, corrections officers on duty at the Chester County Prison were directed to conduct a cell search in the G-block. Prison regulations contemplated that at least one of the occupants of a cell should be present during the search, to witness the fact that no improprieties were occurring. One of the cells being searched was occupied by plaintiff, Gregory Pless, and a cellmate; only the cellmate was present when the officers commenced the search.

Plaintiff took umbrage, objected to the search, and cursed the officers. They reported the incident to their superiors. At about 10:30 p.m., Officer Hunt attempted to serve upon plaintiff a citation charging him with the major misconduct of insabordination [sic], cursing an officer, threating [sic] an officer." After an exchange of words, plaintiff struck Mr. Hunt in the face with his fist. Another officer separated the combatants, and ran to the control room to call for assistance. Plaintiff attempted to enter the control room, but was prevented from doing so, whereupon he returned to Mr. Hunt and continued to beat and kick him, eventually throwing a bench upon him as he lay on the floor. Mr. Hunt required hospitalization.

Plaintiff was immediately placed in segregated confinement in cell C-22, a "medical isolation" cell for unusually disruptive prisoners. On August 4, 1981, plaintiff was given a hearing on the pending disciplinary

charges. Plaintiff contended that he had acted in self-defense, but the Disciplinary Board rejected that defense, and imposed the sanction of 120 days segregated confinement in isolation (30 days for the original offense of resisting the cell search and cursing the officer, and 90 days for the assault on Officer Hunt). Criminal charges were also lodged against plaintiff, and he was eventually convicted and sentenced for aggravated assault and battery.

Plaintiff filed this action, under 42 U.S.C. §1983, to recover damages stemming from this series of events. Plaintiff now acknowledges that he was properly subjected to disciplinary measures for the insubordination and the assault on the officer, but contends that he was subjected to "cruel and unusual punishment" in violation of the Eighth Amendment, and was deprived of due process of law.

The conditions to which plaintiff was subjected in cell C-22 were indeed severe. The cell contained no bunk, mattress, or bed-clothing. There was no running water. The only plumbing consisted of a hole in the floor. In order to use this facility, plaintiff complains, he was required to squat "like an animal". While it was possible to flush the device after use, this necessitated a request to the guard to turn on the water from a control located outside the cell, whereupon plaintiff could flush the toilet, and the water would then be turned off again.

Plaintiff testified that he was not supplied with drinking water, except on occasions when other inmates would manage surreptitiously to provide him with a cup of water. The defendants maintain that drinking water was available from the guard on request. Plaintiff concedes that, on occasion, a guard would heed such request and provide him with a paper cup of water. It appears to be undisputed that water was not supplied in any quantity suitable for washing. It is also undisputed that plaintiff was not provided with a toothbrush or other

basic hygienic needs; the defendants' position is that plaintiff never requested any such amenities.

Plaintiff was confined in cell C-22 continuously, 24 hours per day, from July 30 to August 13, 1981, when he was transferred to cell C-16. Thereafter, he was confined to his cell 22 hours per day, and was permitted exercise outside his cell for two hours daily.

When first placed in cell C-22 on July 30, plaintiff was permitted to wear his trousers, underpants, and (according to the defendants, although the plaintiff disputes this) a T-shirt. It is agreed that he was not permitted a shirt or other clothing. Throughout his entire period in that cell, plaintiff slept on the floor. Initially, he had no bed clothing of any kind, but one of the guards, on his own initiative, provided plaintiff with a blanket after a day or two.

On a more or less daily basis, plaintiff was provided with a broom or mop with which he could clean up the cell.

Plaintiff testified that during the entire period, from July 30 to August 13, he was permitted to take a shower on only two occasions (immediately before scheduled court appearances). This testimony finds support in the "daily isolation log" (in which guards recorded their observations of the plaintiff, at first every half-hour, and later every hour). The logs reflect that plaintiff was permitted to take a shower on August 7 at 2 p.m., August 8 at 2 p.m., August 12 at 9 a.m., and August 18 at 3 p.m. And, beginning August 24, 1981, plaintiff was taken out of his cell to attend court proceedings rather frequently; plaintiff testified that he was able to take a shower on some or all of those occasions (in an area of the prison not covered by the log entries).

Plaintiff is a vegetarian, and has particularly strong religious convictions which preclude his eating pork in any form. Throughout his confinement in cell C-22 and C-16 (*i.e.*, from July 30, 1981 to mid-December of that year) he was presented with regular prison fare on a

"take-it-or-leave-it" basis. It is clear that plaintiff felt obliged to omit many meals entirely (*e.g.*, where the only vegetables were 'contaminated' by pork). On other occasions, plaintiff was able to subsist on the vegetable portions of the meals, skipping the main course. The defendants made no attempt to accommodate plaintiff's dietary preferences.

The task before the court is to determine whether the foregoing circumstances and chain of events worked a violation of one or more of plaintiff's constitutional rights.

With respect to the due process claims, it should be noted that plaintiff was afforded a hearing on August 4, 1981. He was informed of the charges, and had an opportunity to refute them. Thus, his post-August 4 solitary confinement cannot be regarded as a deprivation of liberty without due process of law. The issue, then, is whether it was permissible to impose punitive segregation from July 30, 1981 to August 4, in advance of the hearing. In my view, the prison authorities cannot be faulted for imposing solitary confinement during that period. Plaintiff's outrageous assaultive behavior on July 30 posed a serious threat to prison security, and it was obviously not unreasonable to segregate plaintiff immediately, pending the hearing.

This does not mean, however, that it was permissible to punish plaintiff without a hearing, or to impose restrictions unrelated to the legitimate objective to preserving prison security and restoring order. And it is impossible, on this record, to avoid the conclusion that the treatment accorded plaintiff during that four-day period represented punishment, as opposed to security precautions. For example, the governing regulations include the following provisions, Chapter 37, Pennsylvania Code:

> "95.229. Bedding
>
> "(a) *Minimum requirements*. The minimum re-

quirements regarding bedding for prisoners are as follows:

"(1) Each prisoner shall be provided with a bed, mattress, sheets, and blankets appropriate for the temperature.

"(2) Each prisoner shall be provided a pillow and pillow case.

"(3) Sheets and pillowcases shall be cleaned on a weekly basis and before reissue.

"(4) Blankets shall be laundered or sterilized on a regular basis.

(5) Mattresses shall have a waterproof and fire-resistant cover and shall be sterilized on a regular basis for the maintenance of good hygiene.

"(6) Pillows shall have a waterproof and fire-resistant cover and be sterilized on a regular basis for the maintenance of good hygiene.

* * *

"95.231 Personal Hygiene

"*Minimum Requirements.* The following are the minimum requirements applicable for personal hygiene:

"(1) All prisoners shall bathe no less than twice a week and preferably daily if the physical facilities allow.

(2) The jail shall provide all prisoners with soap, clean towels, razor, toothbrush, and hot and cold water for bathing and shaving.

* * *

"95.233 Visiting

"(a) *Minimum Requirements.* The following are the minimum requirements relating to visiting prisoners (1) . . .

"(2) Prisoners shall not be denied visits or

mail to family memebers [sic] or approved friends as punishment, unless the reason for the denial is due to serious violation of the visiting or mail rules and regulations or there is an obvious security threat.

* * *

"95.240 Discipline and Punishment

"(a) *Minimum Requirements.* The following minimum requirements shall apply to discipline and punishment.

* * *

"(10) Conditions in segregation shall be as follows:

"(i) The cell shall be clean, well-lighted, heated, ventilated, and sanitary.

"(ii) The cell shall be furnished with a mattress, bedding, and toilet facilities.

"(iii) Except in special circumstances, as for example, a suspected suicide threat, the prisoner shall be allowed to wear regular clothing.

* * *

"(v) A bathing and shaving schedule shall be maintained, including the minimum or twice weekly opportunities.

"(vi) Toilet tissue and drinking water shall be provided.

"(vii) The prisoner shall have an opportunity to exercise.

* * *

"(12) Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman, or degrading punishment shall be completely prohibited. . . ."

Defendants concede that the cell in which plaintiff was confined was not equipped with a bed or mattress; and the evidence makes clear that no bed clothing of any kind was provided for a couple of days at least, and that only a blanket was provided thereafter. Counsel for defendants sought to explain this deficiency on the ground that, over a period of time not long before the incident in question, there had been instances of prisoners setting fire to bedding, causing damage to the prison and great danger to other inmates. Hence, it is argued, it was reasonable for the prison authorities to remove such items as bunks and bedding from the cell reserved for the most disturbed inmates. The proffered defense must be rejected, for several reasons. In the first place, there is no evidentiary support for the argument. That is, there is no evidence that the earlier alleged occurrences actually did occur, and no prison official advanced this as an explanation for the treatment accorded plaintiff. Moreover, there is nothing in the record to suggest that this plaintiff could reasonably be perceived as likely to set fire to his bedding; or that anyone thought it really necessary to guard against that possibility. In addition, plaintiff was being observed every half-hour and presumably was, or could readily have been, deprived of access to a source of combustion.

I conclude, therefore, that to the extent plaintiff was deprived of decent bedding materials, access to showers and minimal sanitary facilities, and kept deprived of a reasonable opportunity for exercise, during the period from July 30 to August 4, 1981, he suffered punishment without due process of law.

It is also clear that, in various respects, plaintiff's remaining period of confinement in cell C-22 and, to a lesser extent, his confinement thereafter in cell C-16, subjected him to conditions which violated the applicable regulations, but it does not necessarily follow that plaintiff's Eighth Amendment right to be free from cruel and unusual punishment was therefore infringed. While

the issue is close, I am not prepared to hold that, viewed in its entirety, the punishment inflicted upon plaintiff after the hearing violated his constitutional rights. He was required to sleep on the floor, without adequate bedding and without normal clothing; but it was summertime, and plaintiff apparently did obtain adequate rest. He was deprived of two hours of exercise outside his cell, but he was able to obtain exercise within the cell. The defendants have not established any justification for disregarding plaintiff's special dietary needs, but plaintiff apparently obtained at least minimally adequate nourishment during the entire period.

I conclude, therefore, that plaintiff is entitled only to recover damages for the pre-hearing punishment, to the extent that permissible segregation was enhanced by the substandard conditions to which he was subjected. I conclude that a total award of $100 will adequately compensate plaintiff for that enhancement. The only defendant liable to plaintiff, on this record, is the warden, Thomas G. Frame who, it is apparently conceded, authorized and approved the arrangement. No attempt has been made to establish a defense of good-faith immunity; in any event, that defense would not be available, in view of the clear violations of governing regulations.

Judgment will therefore be entered in favor of the plaintiff and against the defendant Frame in the sum of $100. All claims against the remaining defendants will be dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY PLESS, et al.	:	CIVIL ACTION
v.	:	
RONALD J. MARKS, et al.	:	NO. 81-4463

ORDER

AND NOW, this 30th day of March, 1983, it is ORDERED:

1. Judgment is entered in favor of the plaintiff Gregory Pless and against the defendant Thomas G. Frame in the sum of $100.

2. As to all other defendants, this action is DISMISSED.

3. All claims of the plaintiff Thomas J. Moore are DISMISSED, for lack of prosecution.

/s/
Fullam, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1292

THOMAS J. MOORE, GREGORY PLESS, et al.
Appellees

v.

RONALD J. MARKS, COMMISSIONER THOMAS G. FRAME, WARDEN H.C. MAJOR DE BRUYN, et al.
Agents and employees
Pennsylvania Bureau of Corrections

THOMAS G. FRAME,
Appellant

An Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 81-4463)

District Judge: Honorable John P. Fullam

Submitted under Third Circuit Rule 12(6)
January 24, 1984

Before: GIBBONS, BECKER, *Circuit Judges,* and ATKINS, *District Judge**

(Filed January 27, 1984)

MEMORANDUM OPINION OF THE COURT

BECKER, *Circuit Judge.*

This civil rights action was brought under 42 U.S.C. §1983 by appellee Gregory Pless, who, at all times rel-

* Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

evant to this action, was an inmate of Chester County Prison. Appellants are the administrators of the prison.[1] Pless claims that the actions of appellant Thomas G. Frame, Warden of the prison,[2] in confining him under punitive conditions without a hearing after he attacked a prison correctional officer violated his rights under the due process clause of the Fourteenth Amendment. Pless also claims that the conditions of his confinement were so severe as to amount to cruel and unusual punishment in violation of the Eighth Amendment. After a bench trial, the district court found that Pless had not been subjected to cruel and unusual punishment. The court found, however, that, for the four-day period between the assault and the disciplinary Board hearing concerning the attack on the guard, he had been confined in conditions so deficient that they exceeded the permissible restraints of administrative segregation and constituted "punishment without due process of law." Warden Frame was found liable, and damages were assessed in the amount of $100. The Warden appeals.

The facts as found by the district court are as follows. On July 30, 1981, corrections officers searched the cells in Pless' block. Pless cursed them, and was cited for a misconduct. He then assaulted Officer Ronald Hunt when Hunt attempted to serve the citation upon him; Pless continually beat and kicked Hunt in the face and stomach, causing him to require medical treatment. Pless, clothed only in his trousers and underwear, was immediately placed in isolated confinement. The cell in which Pless was placed contained no bunk, mattress, or bedding. The only plumbing consisted of a hole in the floor which served as a toilet, and which could not be flushed from the inside. There was no running water in

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1. Appellee's co-plaintiff was Thomas Moore, who has since been discharged from prison, and his action dismissed for lack of prosecution.

2. Two other defendants were named, but no liability was found against them.

the cell to wash. Drinking water was not supplied, except on the occasions when other inmates or the guards heeded Pless' requests for a cup of water. Pless was not permitted to leave the cell, nor was he provided with a toothbrush or other basic amenities for hygiene. Pless was confined in these conditions twenty-four hours per day until August 13, 1981, when he was moved into a different cell block in which the conditions were less severe.

On August 4, 1981, Pless was afforded a hearing before the prison disciplinary board. Rejecting his contention of self-defense, the Board imposed sanctions of 120 days of segregated confinement in isolation. He was eventually charged, convicted, and sentenced in Chester County Common Pleas Court for aggravated assault and battery on Officer Hunt.

The district court, presented with these facts, concluded that the overall conditions of confinement, although violative of applicable state regulations, were not cruel and unusual punishment within the prohibition of the Eighth Amendment. The court further held that appellee's post-hearing solitary confinement was not a deprivation of liberty without due process of law because, at the August 4 hearing, he had been informed of the charges against him and had been given an opportunity to refute them. As to the four-day period before the hearing, however, the court concluded that "to the extent Pless was deprived of decent bedding materials, access to showers and minimal sanitary facilities, and kept deprived of a reasonable opportunity for exercise during the period from July 30 to August 4, 1981, he suffered punishment without due process of law."[3] The Court noted in this regard that the conditions of confinement to which Pless was subjected violated numerous state regulations regarding minimal standards of incarcer-

3. The Court rejected appellee's contention that these conditions were justified by security concerns.

ation." *See* 37 Pa. Code §§95.229, 95.231, 95.233, and 95.240.

The court recognized that, in view of the serious threat to prison security posed by appellee's assaultive behavior, authorities acted properly in restricting him, even prior to a hearing, in solitary confinement. *See Hewitt v. Helms*, 103 S. Ct. 864 (1983). However, the court also found that it was impermissible to "punish" Pless without a hearing by imposing restrictions upon him unrelated to the legitimate objective of preserving prison security and restoring order, and that the conditions of Pless' confinement constituted punishment,[4] thereby depriving Pless of a liberty interest without due process in violation of the fourteenth amendment.

None of the district court's factual findings are clearly erroneous. Nor did the court misapply the applicable law. The court conceded that the question was close. We agree. But we also conclude that the district court's approach to the case was thoughtful and sensible, and that it correctly applied the law. The judgment of the district court will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

EDWARD R. BECKER
Circuit Judge

DATED:

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4. A number of cases have found the similar conditions constitute cruel and unusual punishment. *E.g.*, LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); Craig v. Hocker, 405 F. Supp. 656 (D. Nev. 1975). Although we do not go this far, we agree with the district court that the conditions imposed on Pless further no legitimate interest of the prison other than punishment.

APPENDIX C

A-14

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1292

THOMAS J. MOORE,
GREGORY PLESS, et al.

v.

RONALD J. MARKS,
COMMISSIONER THOMAS G. FRAME,
WARDEN H.C. MAJOR DE BRUYN, et al.
Agents and employees
Pennsylvania Bureau of Corrections

THOMAS G. FRAME,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and ATKINS, *District Judge**

The petition for rehearing filed by Appellant, Thomas G. Frame, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

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*Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Judge

Dated: February 28, 1984

APPENDIX D
A-16

EXHIBIT D-3

CHESTER COUNTY FARMS PRISON

INCIDENT CITATION

DATE: 7-30-81

INMATE'S NAME Pless, Gregory CELL 6-32

PLACE OF INCIDENT 6- Block, 6-32

TIME OF INCIDENT 2200 TIME ISSUED 2230

~~MINOR MISCONDUCT~~

(Inmate may accept 24 hour lock-up)

MAJOR MISCONDUCT Insubordination, Cursing an officer, Threating an officer

(Inmate must appear before Disciplinary Board, may not accept 24 hour lock-up, misconduct report must accompany this citation)

LOCK-UP

PTED

RELEASED

NOT OFFERED

(Inmate's Signature NOT to be construed as admission of guilt)

Col Hurst
(Officer's Signature)

DATE PROCESSED 8/4/81

EXHIBIT D-3

APPENDIX E

A-17

COMPLAINT*

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. MOORE
GREGORY PLESS et al.,
Inmates of
Chester County Prison
(Enter above the full name of
the plaintiff in this action.)

v. C.A. #81-4463

COMMISSIONER RONALD J. MARKS,
WARDEN THOMAS G. FRAME,
MAJOR H.C. DE BRUYN, et al.
Agents and Employees
Pa. Bureau of Corrections
(Enter above the full name of the defendant or defendants in this action.)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes (✓) No ( )

B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one law-

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* The Complaint was on a form supplied by the District Court for *pro se* prisoners. Petitioner has deleted sections of the Complaint pertaining to an inmate, Thomas J. Moore, who is not a party to this Petition. Misspellings have been noted but punctuation appears as it did in the original.

suit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit
   Plaintiffs *Thomas J. Moore*
   Defendants *Warden Thomas G. Frame*
2. Court (if federal court, name the district; if state court, name the county)
   Eastern District of Pennsylvania
3. Docket number *81-3599*
4. Name of judge to whom case was assigned
   Hon. Richard A. Powers, III
5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)
   Still pending, filed, 9/4/81
6. Approximate date of filing lawsuit *9/4/81*
7. Approximate date of disposition *Pending*

II. Place of Present Confinement *Chester County Prison*

A. Is there a prisoner grievance procedure in this institution? Yes ( ) No (✓)

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ( ) No ( )

C. If your answer is YES,
   1. What steps did you take? _____
   2. What was the result? _____

D. If your answer is NO, explain why not *Inmates are supposed to complain to their counselors. The counselors usual replies are that, they have no authority to assist us.*

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes (✓) No ( )

F. If your answer is YES,
   1. What steps did you take? *Plaintiff Moore has written to Commissioner Marks and re-*

quests to Central Control. Plaintiff has copies. New directives prohibit signing of carbon copies.

2. What was the result? *Plaintiff Moore received letter from Commissioners office, stating phone conversation with prison officials, has assured Commissioners office, that all administrative procedures, are within the law. There still has been no change in prison procedures.*

III. Parties

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff *Thomas J. Moore, Gregory Pless, et al., inmates*
Address *Chester County Prison*

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants).

B. Defendant *Ronald J. Marks* is employed at *Commissioner Pa. Bureau of Corrections* at *Camp Hill, Pa. 17011 - P.O. Box 598.*

C. Additional Defendants *Warden Thomas G. Frame, Major H.C. DeBruyn, both of Chester County Prison, R.D. #4, W. Chester, Pa., 19380, et al., agents and employees of the Penna. Bureau of Corrections*

IV. Statement of Claim

(State here as briefly as possible the *facts* of your

case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.)

[Paragraphs 1 through 5 of Statement of Claim of Plaintiff Moore are omitted]

6. On 7/30/81, Plaintiff Pless, was removed from G-Block to the "Punitive Isolation" Cell "C-22", by officers Anderson and Stevens.
7. On 8/4/81, Pless was given a disciplinary hearing by Capt. Rilatt, Sgt. Gray, and C.O.1 Poles. Pless was charged with "assaulting an officer", C.O.1 Hunt. Plaintiff Pless, pled guilty, and was sentenced to 120 days in Cell "C-22".
8. Approximately (1) one hour after Pless's hearing, he was taken to Kennet Square, Pa., and arraigned on criminal charges of "simple and aggravated assault," by District Justice, Eugene J. DiFilippo, Jr.
9. On 8/9/81, Pless's sister, Ms. Linda Thompson, arrived at the prison to visit. She was told that Pless was on (24) twenty-four hour lock-up, and that he was not to have any visits for the duration of his stay in this prison.
10. On 8/12/81, Counselor Dasch [sic], came to Cell "C-22", to inform Pless, that his attorney, Mr. Angus Love, had called to speak with him, on an unrelated matter, but that Central Control had refused to allow Pless to speak with his attorney on the phone.
11. On 8/13/81, Pless's attorney, came to visit; Pless was permitted to see him. After the legal

visit, Pless was transferred from Cell "C-22" to Cell C-16.

12. "Strip Cell" - "C-22", is completely barren, with the exception of a "hole" in the floor for defecation. There is and was no bunk, mattress, toilet, sink, sheet, blanket, or running water. Pless was denuded except for his pants. Ventilation in "C-22", is almost nonexistent. The solid metal door leading to "C-22" reads "Medical Isolation." Based upon information and belief, Cell "C-22", serves only to "punish".
13. During Pless's (13) thirteen days of confinement in Cell "C-22" Pless was:

A. Denied showering, washing, soap, toilet paper, or any of the "basic necessities of hygiene".
B. Denied any exercise period.
C. Restricted from attending religious services, and since he is Muslim and a vegetarian, he has been existing on a diet of dry cereal and water, occassionally [sic] cheese. (A lot of the vegetables are cooked in pork fat.)
D. Denied access to the Law Library and materials.
E. Denied phone calls, legal, or otherwise.

14. As of 9/12/81, Pless's situation has changed only by moving to Cell C-16, which does have a bunk, mattress, toilet, sink, allotment of (2) two hours daily exercise and (2) two showers weekly.
15. At the time of incident, 7/30/81, Pless was only a detainee, being held in lieu of bail.
16. Based upon information and belief, plaintiffs allege partial treatment of some inmates.
17. Based upon information and belief, Defendants Frame and DeBruyn encouraged his staff to "get tough" with "jailhouse lawyers".

18. Based upon information and belief, the policy and practice of Chester County Prison is to forbid inmates from corresponding or talking with other inmates, who are in "isolation", even when such communication is essential to the conduct of a lawsuit.
19. Based upon correspondence, and information and belief, Defendant Marks was aware, or should have been aware, of the actions of the Administration, and its officers of Chester County Prison, in the proper exercise of his official duties.

V. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

Plaintiffs respectfully pray, that this court enter judgment granting plaintiffs: 1. appointment of legal counsel, 2. a T.R.O., which requires defendants to "and/or" from: A. Rescind policy directive concerning "punitive isolation" (P.I.) inmates restriction from practicing their

A. Religious beliefs and allow adequate diets, consistent with beliefs.
B. Allow "PI" inmates, access to the Law Library, materials, and communication, with each other, in relation to the conduct of this suit.
C. Rescind policy directive, concerning "P.I." inmates restriction of phone calls and/or phone visits, legal or otherwise.
D. Denying "P.I." inmates right to receive or purchase tobacco, legal materials, and the "basic elements of hygiene", from the prison canteen and allow them "outdoor" exercise like other "isolation" inmates.
E. Prohibit use of "strip cell" - C-22.

F. Prohibit defendants, their agents, employee's, successors in interest, and all persons in active concert, or participation with them, from harrassing, threatening, punishing, or retaliating, in any way against plaintiffs, because they filed this action, or against any other inmate because they submitted affidavits in this case on behalf of plaintiffs, or from transferring plaintiffs to any other institution, without their express consent, during the pendacy [sic] of this action. This order should also include, retaliation against sympathetic C.O.1 officers, who submit affidavits, on behalf of plaintiffs, or aid plaintiffs in their efforts to secure their "rights". Such officers are not to be retailiated against, in any way, shape or form. Such officers are not to be terminated or given less desireable [sic] positions within or without this institution, during pendacy [sic], or after disposition of this action.

G. Allow plaintiffs and other inmates to engage in any oral or written communication, which is reasonably related to the conduct of their suit, including the preparation of affidavits on behalf of plaintiffs and prepare legal papers, and to do anything else, consistent with prison security, which is reasonably connected with the conduct of this suit. This order should include the general population, as well as "isolation" inmates, and Plaintiff Moore, after his discharge from this institution.

H. Adequately stock, and update lawbooks and materials in the Law Library, so that it conforms with Supreme Court rulings.

I. Allow "due process", at disciplinary hearings.

J. Impartial treatment of "all" inmates.

I) "All" inmates should be given the same consideration at disciplinary hearings.

II) Appointments and approval of institutional

jobs, programs, work release, and parole, should be based upon merit and rehabilitative initiative, as adversed [sic] to the amount of "information" given to the administration.

K. Issue regulations that prohibit these types of restrictions, in the future, and make amendments to prison policies, so that they conform with Supreme Court rulings and opinions.

3. Such other and further relief, as this court may deem just, proper and equitable.

Signed this 12th day of September, 1981.

Respectfully submitted,

Gregory D. Pless
Thomas J. Moore

_____
(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

Gregory D. Pless
Thomas J. Moore

9/12/81
_____
(Date)

_____
(Signature of Plaintiff